

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

United States of America,	)	CR 08-01378-TUC-FRZ(JCG)
	)	
Plaintiff,	)	<b>REPORT AND RECOMMENDATION</b>
	)	<b>RE: MOTION TO DISMISS FOR</b>
vs.	)	<b>VINDICTIVE PROSECUTION</b>
	)	
Jose Martin Oropeza,	)	
	)	
Defendant.	)	
	)	
<hr/>		

Pending before the Court is Defendant Jose Martin Oropeza’s Motion to Dismiss for Vindictive Prosecution. (Doc. 34.) Defendant's Motion to Dismiss seeks dismissal of Counts One and Three of the Superceding Indictment filed on August 19, 2009. The government filed a Response on February 22, 2010 (Doc. 52) and Defendant filed a Reply on March 1, 2010. (Doc. 53.) Defendant's Motion was set for oral argument and heard on March 2, 2010. The matter was submitted following oral argument at the conclusion of the hearing and taken under advisement. Having now considered the matter, the Magistrate recommends that the District Court deny the Motion.

Background

This case involves the straw purchase of nine firearms which the government alleges were turned over to a Mexican national who could not legitimately purchase guns in the United States. The government alleges that Oropeza purchased nine firearms from five different licensed firearms dealers between September 5, 2007 and October 11, 2007. The

1 Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) became aware of the situation  
2 when an official from the Republic of Mexico called the Tucson Field Office to request a  
3 trace of a weapon used in a murder in Hermosillo, Sonora, Mexico in late 2007. The trace  
4 of the weapon showed Oropeza was the purchaser.

5 During a recorded interview with ATF on December 17, 2007, Oropeza admitted that  
6 he had purchased about seven firearms for a childhood friend from Mexico named "Cristian,"  
7 paying for each firearm with Cristian's money. Cristian would drive Oropeza to gun  
8 dealerships, give Oropeza cash for the purchases, and tell Oropeza which firearms to  
9 purchase. After leaving the dealership, Oropeza turned over the firearms to Cristian who he  
10 believed took the guns to Mexico. Oropeza confirmed that a photograph of the Mexican  
11 homicide suspect, Cristian Ignacio Chavez-Velarde, was his friend "Cristian."

12 On November 5, 2008, Oropeza was indicted on one count of false statement during  
13 purchase of a firearm. The indictment alleged that during the October 2, 2007 purchase of  
14 a Herstal pistol, Oropeza falsely represented that he was the "actual buyer of the firearm."  
15 (Doc. 8.) The parties engaged in plea negotiations after the indictment, while the ATF  
16 continued to investigate Oropeza's purchase of weapons.

17 On April 7, 2009, ATF agents became aware of a second firearm recovered at a crime  
18 scene in Mexico which was traced back to Defendant.<sup>1</sup> During the course of its investigation,  
19 the government determined that Oropeza had purchased at least nine firearms, rather than the  
20 seven Oropeza indicated during his December 2007 interview.

21 In the spring of 2009, Oropeza advised the government that he would proceed to trial.

22 On July 5, 2009, Defendant filed a Motion in Limine to preclude Defendant's  
23 uncorroborated statements. (Doc. 26.) Defendant argued that his statements alone were  
24 insufficient to establish his guilt and requested that the Court preclude the statements at trial  
25 unless the government first provided independently corroborated evidence that Defendant  
26

---

27 <sup>1</sup>ATF agents had not inquired about this second gun during the December 17, 2007, interview,  
28 because the second gun had not been recovered at that time.

1 falsely filled out the purchase forms. On July 17, 2009, the government filed a response  
2 indicating it would offer independent evidence to corroborate Defendant's statements. (Doc.  
3 29.)<sup>2</sup>

4 Before filing its response to the Motion in Limine, the government moved, on July 6,  
5 2009, for continuance of the July 14 trial date, stating that additional time was needed to  
6 procure Mexican officials to testify regarding certified documents. (Doc. 27.) The request  
7 was unopposed. (*Id.*)<sup>3</sup>

8 The parties continued to discuss potential resolution by plea during this time. The  
9 government asserts, and Oropeza does not dispute, that during a final plea negotiations  
10 meeting on August 14, 2009, the government advised defense counsel that if Oropeza did not  
11 accept its plea offer, the government would proceed with trial preparations, which included  
12 seeking a superseding indictment adding additional charges. Defense counsel also asserts that  
13 government counsel told defense counsel that the uncorroborated statements issue had  
14 motivated the government to supercede the indictment. (Reply, Doc. 53, p. 2, l. 27-28).

15 Ultimately, Oropeza rejected the government's plea offer and, on August 19, 2009,  
16 the government obtained a Superceding Indictment. The Superceding Indictment added two  
17 charges: Count I and Count III. Count I charges Oropeza with Conspiracy to Defraud, and  
18 alleges that Oropeza conspired with others to purchase firearms by making fraudulent  
19 statements. Count 2 lists as overt acts, Oropeza's purchase of seven firearms between  
20 September 5, 2007 and October 11, 2007. Count 3 alleges an additional count of False  
21 Statement During Purchase of a Firearm and relates to the September 11, 2007 purchase of  
22 a firearm in Mesa, Arizona.

---

23  
24  
25 <sup>2</sup>The motion in limine is pending.

26 <sup>3</sup>Numerous requests for continuance of trial were requested by the parties and granted by the Court  
27 during the pendency of the case, for a variety of reasons, including Defendant's desire to further  
28 research a legal matter (Doc. 15), Defendant's desire to present certain legal issues (Docs. 17, 21),  
schedule conflicts (Docs. 19, 23), and the government's need for time to procure Mexican officials  
to testify at trial (Docs. 27, 35). All of the motions were unopposed.

1 On October 26, 2009, Defendant filed the Motion to Dismiss currently at issue. In his  
2 Motion, Defendant contends that the government filed its Superceding Indictment in  
3 retaliation for Oropeza's exercise of a procedural right, specifically his filing of the Motion  
4 in Limine. Defendant requests that the Court dismiss Counts 1 and 3 of the Superceding  
5 Indictment.

#### 6 Discussion

7 A prosecutor violates due process when additional charges are sought solely to punish  
8 a defendant for exercising a constitutional or statutory right. *See Bordenkircher v. Hayes*,  
9 434 U.S. 357, 363 (1978).

10 Claims of vindictiveness are evaluated differently depending on when additional  
11 charges are added. *See United States v. Goodwin*, 457 U.S. 368, 380-81 (1982); *United*  
12 *States v. Gamez-Orduno*, 235 F.3d 453, 462 (9<sup>th</sup> Cir. 2000). The Supreme Court has held that  
13 there is generally no presumption of prosecutorial vindictiveness in the pretrial setting,  
14 particularly when plea negotiations are on-going. *Goodwin*, 457 U.S. 368, 377-79, 381-82  
15 (threatening and then filing more severe charges as an outgrowth of plea negotiations does  
16 not violate due process). *Gamez-Orduno* 235 F.2d at 463 (citing *Bordenkircher*, 434 U.S.  
17 at 363-64). That is not to say that prosecutorial conduct aimed at punishing a defendant  
18 because he has exercised his legal rights does not ever violate due process in the pretrial  
19 setting; rather, in the context of pretrial plea negotiations, "vindictiveness will not be  
20 presumed simply from the fact that a more severe charge followed on, or even resulted from,  
21 a defendant's exercise of a right." *Gamez-Orduno*, 235 F.3d at 462 (internal citations  
22 omitted).

23 Oropeza may establish vindictiveness by producing direct evidence of the  
24 government's punitive motivation. *See United States v. Jenkins*, 504 F.3d 694, 699 (9<sup>th</sup> Cir.  
25 2007). In the absence of such evidence, Oropeza is entitled to a presumption of  
26 vindictiveness if he establishes that the additional charges were filed because he exercised  
27 a constitutional, procedural or statutory right in circumstances that give rise to an appearance  
28 of vindictiveness. *Id.* "[T]he appearance of vindictiveness results only where, as a practical

1 matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not  
2 have occurred but for hostility or a punitive animus towards the defendant because he has  
3 exercised his specific legal rights.” *United States v. Gallegos-Curiel*, 681 F.2d at 1164, 1169  
4 (9<sup>th</sup> Cir. 1982).

5 Oropeza concedes that he has no evidence of actual vindictiveness (Reply, Doc. 53,  
6 p. 3, l. 9-10); moreover, there is no evidence of such in the record. Oropeza contends that  
7 the Court should find an appearance of vindictiveness because the additional charges  
8 followed Defendant’s filing of his Motion in Limine. It is well established, however, that the  
9 government’s filing of additional charges after a defendant files pretrial motions does not,  
10 without more, raise a presumption of vindictiveness. *See Gamez-Orduno*, 235 F.3d at 463  
11 (vindictiveness cannot be presumed from fact that superseding indictment filed shortly after  
12 defendant filed motion to suppress); *United States v. Noushfar*, 78 F.3d 1442, 1446 (9<sup>th</sup> Cir.  
13 1996) (same); *United States v. Austin*, 902 F.2d 743 (1990) (filing of twenty-five count  
14 superseding indictment adding eleven counts not vindictive even if in response to motion to  
15 dismiss eight counts of fourteen count indictment on legal grounds). The courts refuse to  
16 presume vindictiveness in such situations, reasoning: “[I]t is unrealistic to assume that a  
17 prosecutor’s probable response to [pretrial] motions is to seek to penalize and to deter. The  
18 invocation of procedural rights is an integral part of the adversary process in which our  
19 criminal justice system operates.” *Goodwin*, 457 U.S. at 381.<sup>4</sup>

20 Defendant asserts that the real reason for the superceding indictment was to remedy  
21 the evidentiary defects that he pointed out in his Motion in Limine. Prosecutorial  
22 vindictiveness is found where the additional charges are sought solely to punish the  
23 defendant for exercising his rights. If the government was motivated to seek the superceding  
24

---


25 <sup>4</sup>Defendant asserts that the timing of the government’s procurement of a superceding indictment also  
26 creates an appearance of vindictiveness because the additional charges arise out of the same nucleus  
27 of facts as the original charges. Although those charges may be related to Defendant’s purchase of  
28 firearms for Cristian during the same time period, it is undisputed that the government did not learn  
that another weapon purchased by Defendant was found in Mexico in relation to a criminal act until  
after the original indictment was obtained.

1 indictment based on evidentiary issues, there is no prosecutorial vindictiveness. The  
2 government's efforts to cure perceived problems with the admission of evidence does not  
3 constitute a punitive animus.<sup>5</sup> *Gallegos-Curiel*, 681 F.2d at 1169 (a charging decision is not  
4 improper unless it results **solely** from exercise of a protected legal right). This is particularly  
5 true given that the additional charges did not increase the severity of the charge or the  
6 sentence. *U.S. v. Aespuro*, 938 F.Supp. 623, 617 (E.D.Cal. 1996), *citing United States v.*  
7 *Kinsey*, 994 F.2d 699, 701 (9<sup>th</sup> Cir. 1993). The "doctrine of vindictive prosecution does not  
8 apply when 'there has been no increase in the severity of the charge for the sentence  
9 imposed.'" *Id.*

10 For the foregoing reasons, the Magistrate recommends that the District Judge, after  
11 his independent review, DENY Defendant's Motion to Dismiss for Vindictive Prosecution.  
12 (Doc. 34.)

13 Pursuant to Federal Rule of Criminal Procedure 59(b)(2), the parties have fourteen  
14 (14) days to serve and file written objections to the Report and Recommendation. If  
15 objections are not timely filed, they may be deemed waived. The parties are advised that any  
16 objections should be filed with the following caption: CR 08-01378-TUC-FRZ.

17 DATED this 5<sup>th</sup> day of March, 2010.

18  
19  
20  
21  
22   
Jennifer C. Guerin  
United States Magistrate Judge

23  
24 <sup>5</sup>Defendant also argues that if he had not graciously given the government five weeks to address his  
25 Motion in Limine, the trial would have occurred the month before the government sought new  
26 charges against him. (Reply, Doc. 53, p. 5, l. 7-14). Defendant may be confusing two different  
27 motions. From the record, it does not appear that any extensions were given to the government  
28 regarding the Motion in Limine. The Motion was filed on July 5, 2009. The government timely  
filed its response on July 16, 2009. Defendant did, however, agree to extensions for the government  
to file its response to the Motion to Dismiss, the motion which is the subject of this report. (See Doc.  
37).